

**REMARKS**

The Final Office Action mailed July 22, 2010, has been received and reviewed. Claims 1 through 29 are currently pending in the application, of which claims 1 through 23 are currently under examination. Claims 24 through 29 are withdrawn from consideration as being drawn to a non-elected invention. Claims 1 through 23 stand rejected. Clarifying amendments have been made to the claims. Applicants respectfully request reconsideration of the application as amended herein.

**35 U.S.C. § 103(a)**

Claims 1, 2, and 4 through 21 stand rejected under 35 U.S.C. § 103(a) as assertedly being unpatentable over U.S. Patent 5,639,949 to Ligon et al. ("Ligon") and International Publication WO 00/61068 to Colin et al. ("Colin"). Applicant respectfully traverses this rejection, as hereinafter set forth.

To establish a *prima facie* case of obviousness, the Examiner must determine whether there is "an apparent reason to combine the known elements in the fashion claimed by the patent at issue." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418, 82 U.S.P.Q.2d 1385 (2007). Further, rejections on obviousness grounds "cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *Id.* (quoting *In re Kahn*, 441, F.3d 977, 988 (Fed. Cir. 2006)). Finally, to establish a *prima facie* case of obviousness, there must be a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Furthermore, the reason that would have prompted the combination and the reasonable expectation of success must be found in the prior art, common knowledge, or the nature of the problem itself, and not based upon the Applicant's disclosure. MPEP § 2144. Hindsight cannot be used to determine obviousness. *KSR*, 550 U.S. at 421.

The 35 U.S.C. § 103(a) obviousness rejection of claims 1, 2, and 4 through 21 is improper because Ligon in view of Colin, taking common knowledge into consideration, does not teach or suggest a formulation comprising "from about 100 g to about 400 g veterinary-acceptable surfactant(s) per liter of the formulation" and "from about 50 g to about 350 g of



water per liter of the formulation,” as recited in independent claim 1.

Ligon teaches a substance that “requires one or more nonendogenous enzymatic activities foreign to a plant to be produced, . . . which substance has a deleterious effect on the multiplication or growth of a pathogen.” Ligon, col. 3, ll. 57–61 (emphasis added). Though the substances taught in Ligon may include water, *see, e.g.*, Ligon, col. 18, l. 42, nothing in Ligon teaches or suggests the use of veterinary-acceptable surfactants. The substance taught in Ligon is for the treatment of plants, which are afflicted by different pathogens than animals and which require vastly different application of antipathogenic treatments than animals do.

Specifically, plant treatments are administered by methods suitable to uptake by plants, whereas animal treatments are calculated to deliver active agents to the blood streams of the animals. The substances in Ligon are taught to be effective on an entirely different kingdom of organisms (plants). The element of veterinary-acceptable surfactants—a necessary feature for treatments to be administered to animals, but completely irrelevant for plant formulations—would not have been obvious to a person having ordinary skill in the art.

Colin does not remedy this deficiency because Colin does not teach or suggest an aqueous pour-on formulation, either alone or in combination with agrochemical formulations. Agrochemical formulations are not applied to animals, and there is no teaching or suggestion that they would be effective on animals.

Colin in fact teaches away from the substances taught in Ligon. Colin teaches that the water-insoluble active agents are normally delivered as suspensions, and that avoiding the problems of suspensions requires dissolving the agents in a solvent. Colin, p.1, ll. 23–25; p.2, ll. 17–18. Since the first active agent of claim 1 is water-insoluble, Colin cannot be read to teach the use of water as a solvent. Furthermore, the desirability of keeping the total volume of the formulation low to avoid run-off of a pour-on formulation (*see* as-filed application, para. [0006]) suggests that adding solvents in which the active ingredient is not soluble would not be desirable.

“The mere fact that references can be combined or modified does not render the resultant combination obvious unless the results would have been predictable to one of ordinary skill in the art.” MPEP 2143.01. In this case, the results of combining the plant treatment of Ligon with the pour-on formulation of Colin would not have been predictable to one of ordinary skill in the



art because no reason would have existed to combine a water-insoluble active agent with water in the formulation of a topical for animals. Since the active agent is water-insoluble, adding water would be expected to only add to the volume of the formulation that must be applied without adding any active ingredient. Adding volume to such a formulation compounds problems with application of topical treatments because active ingredients may run off (as-filed application, para. [0006]).

Furthermore, Colin teaches developing formulations with solvents that “have a good affinity for penetrating skin.” Colin, p. 2, l. 5. Nothing in Colin suggests that water would be such a solvent. Likewise, nothing in Ligon makes that suggestion; Ligon does not even concern organisms that have skin.

Ligon and Colin do not teach or suggest the combination of elements of “from about 100 g to about 400 g veterinary-acceptable surfactant(s) per liter of the formulation” and “from about 50 g to about 350 g of water per liter of the formulation,” as recited in independent claim 1. Therefore, Applicant requests that the Examiner withdraw the 35 U.S.C. § 103(a) obviousness rejection of claim 1.

The nonobviousness of independent claim 1 precludes a rejection of claims 2 and 4 through 21, which depend therefrom, because a dependent claim is obvious only if the independent claim from which it depends is obvious. MPEP § 2143.03. Therefore, Applicant requests that the Examiner withdraw the 35 U.S.C. § 103(a) obviousness rejection to claims 2 and 4 through 21.

Claims 3, 22, and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ligon and Colin in further view of U.S. Patent 7,026,290 to Domb (“Domb”) and U.S. Patent 5,981,256 to Egelrud et al. (“Egelrud”). Applicant respectfully traverses this rejection, as hereinafter set forth.

The Examiner cited Domb for its teaching of polyoxyethylene (20) sorbitan monolaurate, recited in claims 3 and 22. The Examiner cited Egelrud for its teaching of diethylene glycol monobutyl ether, recited in claim 22. Neither of these references overcomes the deficiencies of Ligon and Colin, namely that they do not teach or suggest the combination of elements of “from



about 100 g to about 400 g veterinary-acceptable surfactant(s) per liter of the formulation” or “from about 50 g to about 350 g of water per liter of the formulation,” as recited in independent claim 1. Because the combination of references (Ligon, Colin, Domb, and Egelrud) does not teach or suggest all the limitations of independent claim 1, that claim is nonobvious. The nonobviousness of independent claim 1 precludes a rejection of claims 3, 22, and 23, which depend therefrom, because a dependent claim is obvious only if the independent claim from which it depends is obvious. MPEP § 2143.03. Therefore, Applicant requests that the Examiner withdraw the 35 U.S.C. § 103(a) obviousness rejection to claims 3, 22, and 23.

#### **ELECTION OF SPECIES REQUIREMENT**

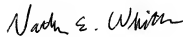
Applicant respectfully submits that independent claim 1 has a special technical feature corresponding to the subject matter recited in independent claim 24. Therefore, independent claim 24, and claims 25 through 29, which depend therefrom, remain generic to the subject matter recited by claims 1 through 23. In view of the allowability of independent claim 1, claims 24 through 29, which have been withdrawn from consideration, should also be considered and allowed. MPEP § 806.04(d).



**CONCLUSION**

Claims 1 through 29 are believed to be in condition for allowance, and an early notice thereof is respectfully solicited. Should the Examiner determine that additional issues remain which might be resolved by a telephone conference, she is respectfully invited to contact Applicant's undersigned agent.

Respectfully submitted,



Nathan E. Whitlock  
Registration No. 65,744  
Agent for Applicant  
TRASKBRITT  
P.O. Box 2550  
Salt Lake City, Utah 84110-2550  
Telephone: 801-532-1922

Date:   
NEW/new